JD–53-21
Washington, DC

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

AMERICAN MEDICAL RESPONSE
MID-ATLANTIC, INC.

and Case 05-CA-221233

MOSIAH O. GRAYTON,
An Individual

Brendan Keough and Christy E. Bergstresser, Esq., for the General Counsel.
Brian T. Carmody, Esq. (Carmody and Carmody, Glastonbury, Connecticut) and John M. Barr, Esq., (Richmond, Virginia) for the Respondent.

DECISION UPON REMAND

On June 29, 2021, the Board vacated its decision at 369 NLRB No. 125 (2020) and remanded this case to me. It directed me to reconsider this case in light of its decision in *General Motors,* 369 NLRB No. 127 (2020). On June 30, I requested supplemental briefs. Although the Board stated that I could reopen the record upon the request of a party, neither did so.

In *General Motors,* the Board overruled its decision in *Atlantic Steel,* 245 NLRB 814 (1979) and held that misconduct that occurs in the context of Section 7 is to be analyzed pursuant to the test in *Wright Line,* 251 NLRB 1083 (1980). Thus, once the General Counsel makes an initial showing of discrimination, the Respondent Employer must meet its burden of proving that it would have taken the same action even in the absence of the Section 7 activity.

Pursuant to the Board's *General Motors* decision it makes no difference whether or not an employee was engaged in protected activity in determining whether an employer legally disciplined or discharged the employee.[1]

[1] In *General Motors* the General Counsel alleged that the Employer violated Section 8(a)(3) and (1) in suspending union committeeman Charles Robinson on 3 occasions. ALJ Donna Dawson, applying *Atlantic Steel,* ruled that Robinson lost the protection of the Act with regard to 2 of those suspensions. However, she held that he did not with regard to a 3-day suspension for telling his manager that he could shove his cross-training up his ass.

In *Atlantic Steel Co.,* 245 NLRB 814 (1979) the Board held that in the case of direct communications between an employee and manager or supervisor, the Board balances four factors: 1) the place of discussion; 2) the subject matter of the discussion; 3) the nature of the employee's outburst and 4) whether the outburst was provoked by an employer's unfair labor practice.

The decision also overrules all relevant cases to the extent they are inconsistent with the *General Motors* holding.[2] Thus cases such as *St. Margaret Mercy Health Care Centers,* 350 NLRB 203, 204-05 (2007), in which the Board, citing *Dreis & Krump Mfg. v. NLRB,* 544 F. 2d 320 (7th Cir. 1976) stated "Otherwise protected activity remain[s] protected unless found to be 'so violent or of such serious character as to render the employee unfit for further service," are no longer good law. Likewise, it no longer matters as required by *Atlantic Steel* whether the employee's misconduct was provoked by the employer's unfair labor practices.

In the instant case, I reiterate my conclusion that Mosiah Grayton engaged in protected activity in her confrontation with Page Johnson on December 6, 2017. What remains to be determined is whether Respondent met its burden of proving its affirmative defense with regard to Grayton's May 2018 termination and with regard to her December 2017 Last Chance Agreement. If Respondent did not meet its burden with regard to the Last Chance Agreement, it could not have met its burden with regard to the termination. In May 2018, Brianna Hampleton, who engaged in the same misconduct, received a final written warning instead of a discharge.

I hereby incorporate the facts found in my prior decision as follows.

STATEMENT OF THE CASE

Arthur J. Amchan, Administrative Law Judge. This case was tried in Washington, D.C. on May 22-23, 2019. Mosiah O. Grayton, filed the initial charge on May 24, 2018. She filed amended charges on June 4, 2018 and January 9, 2019. The General Counsel issued the complaint on February 4, 2019.

The General Counsel alleges that Respondent, American Medical Response (AMR), violated the Act by suspending and issuing Mosiah Grayton a last chance agreement in December 2017 and then by discharging her in May 2018 because she violated the terms of the last chance agreement. The General Counsel does not allege that the May 2018 conduct for which Ms. Grayton was discharged was protected. However, the discharge was predicated upon the last chance agreement, which she alleges was issued for conduct that is protected by Section 7 of the Act.

On the entire record,[3] including my observation of the demeanor of the witnesses, and after considering the briefs and supplemental briefs filed by the General Counsel and Respondent, I make the following

[2] Slip op 9, fn. 22.

[3] At Tr. 235, line 13, I either said or meant to say hearsay with regard to matters asserted by Ms. Johnson, rather than Mr. Rohde.

FINDINGS OF FACT

I. JURISDICTION

Respondent AMR is a corporation which operates ambulances in Washington, D.C. and elsewhere in the United States.[4] AMR admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the American Federation of State, County and Municipal Employees (AFSCME), District Council 20, which represented Mosiah Grayton when she was employed by AMR, is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

Mosiah Grayton worked for Respondent as an emergency medical technician (EMT) for 3 ½ years. Her employment with AMR was not continuous. Grayton's last period of employment was from March 2016 to May 24, 2018, when she was terminated. As an EMT, Grayton transported low priority patients, for example taking them by ambulance from a nursing home to a doctor's appointment. Respondent's EMTs work in pairs. Throughout her last period of employment, Grayton's partner most of the time was Briana Hampleton.[5]

The events of November 2017

Generally, when EMTs return to their base of operations on V Street N.E., a supervisor is present to meet them. One of the things the supervisors check is the level of fuel in the ambulances' tank. The supervisor who meets them is not the same person every time.

At the end of a shift on November 8, 2017, Grayton, who was driving, and Hampleton, who was in the passenger seat of the ambulance, returned to the base. They were met by Supervisor Stephen Pawlak. Pawlak told them they must completely fill the gas tank before clocking out. This is consistent with Respondent's Standard Operating Procedures. However, other supervisors required the tank to be no more than 3/4 full.[6] Additionally, a white board on which supervisors left messages, directed the EMT's to ensure that the fuel tanks were ¾ full. Grayton argued with Pawlak and refused to fill the tank to the top.[7]

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[4] Respondent operated in Washington, D.C. throughout 2018.

[5] Grayton's disciplinary record prior to November 2017 is not relevant to this case. However, prior to November 2017, Respondent disciplined Grayton on 3 occasions for being tardy. In October 2017, it suspended her for 2 days for tardiness. In June 2017, Respondent issued Grayton discipline for speeding.

[6] The testimony of Grayton and Hampleton on this point is uncontradicted. Pawlak, who was still a supervisor for AMR, did not testify. Although Respondent represented that Pawlak was on military leave at the time of this hearing, it made no representation regarding efforts to have him testify. There is no evidence that he could not have done so.

[7] In September 2017, Grayton complained to Paige Johnson that Pawlak was displaying favoritism on the basis of race and asked that Johnson investigate. Prior to Grayton's complaint, another employee complained to Johnson about Pawlak displaying favoritism in carrying out his duties.

The events of December 6, 2017

In December, Respondent suspended both Grayton and Hampleton for 2 days, December 4 and 5, 2017, for misconduct on November 8. On December 6, Grayton and Hampleton went to the office of Paige Johnson, then Respondent's Regional Administrative Supervisor.[8] Johnson's account of the meeting and Grayton's account are fairly similar and credited. Briana Hampleton's account is somewhat different. I do not credit Hampleton's account to the extent it differs from that of Johnson and Grayton because it is apparent to me that Hampleton's overriding concern since December 6 has been to ensure that she did not get into any more disciplinary trouble with Respondent.[9] What occurred is as follows, G.C. Exh. – 5 [December 6, 2017 notes of Paige Johnson and email of those notes to Sonsaraye Byers, then AMR's HR generalist].

> Brianna Hampleton approached me about decision to suspend her for refusal to refuel a truck. She indicated that Stephen statement provided to management was incorrect because she was never driving the unit and did not park unit. She also expressed concern that she was issued a suspension when she has never received any previous write up. I explained to her that progressive disciplinary action are in place for Attendance & Punctuality violations but not for any other company violations. While speaking to Ms. Hampleton Mosiah Grayton burst into the conversation with high pitched tone stating "How come its acceptable for some supervisor's for units to be brought at ¾ but not others" she indicated Mr. Siegel had just asked about their fuel level coming off shift and he deemed ¾ adequate. I tried to inform her that she should raise that concern to management, and she began to yell and say "for what yall don't look into our concerns and yall don't care, the same way I submitted a write up on Stephen Pawlak being bias to crews and nobody looked into this" I tried to speak again, and she continued to cut me off so I told her to back away from my office.
>
> Ms. Hampleton remained in my doorway and Ms. Grayton started to walk away I made statement "that I would not tolerate disrespect to which Ms. Grayton turned around and yelled some more about how HR does nothing and other things." Again, I verbalized "I would not tolerate any disrespect and she could have a nice day." After Ms. Grayton left out, I printed and provided Ms. Hampleton with the Grievance policy and told her she should follow policy if she truly disagreed with companies' decision and she said Ms. Paige I don't have nothing to do with what just happened with Ms. Grayton and thank and left out of my office.

[8] Johnson no longer worked for AMR at the time of this hearing. I regard her account of the December 6, 2018 meeting, G.C. Exh. 5, to be an admission of a party under Federal Rule of Evidence 801(d) and therefore not hearsay and therefore credible.

[9] Respondent had already suspended Hampleton for conduct which, according to Hampleton, was solely Grayton's. In her incident report form, G.C. Exh. 8, Hampleton reticence is shown by her unwillingness to mention the subject of the question she had for Paige Johnson. I infer that Hampleton was afraid that she would be disciplined for Grayton's outburst on December 6. At the trial, Hampleton reiterated her fear of disciplinary retaliation, Tr. 208.

> This is not the first time Ms. Grayton has displayed this type of behavior at all.
>
> I would like to make sure these accounts are documented and provided to you in timely fashion to be addressed as this is not the first time a provider has yelled or been combative or argumentative with me with no recourse!

G.C. Exh. 5.

I also credit Grayton's testimony at Tr. 91-92 which adds details not contained in Johnson's emails. Grayton complained to Johnson that Hampleton's suspension was unfair because Hampleton never refused to fill the tank as directed by Pawlak. She asked that Respondent rescind it. Grayton also complained that supervisors were inconsistent with regard to whether the fuel tank was to be full or ¾ full. When Johnson asked her to document this inconsistency, Grayton started yelling that human resources did not take her complaints, such as her bias complaint about Pawlak seriously and never did anything about them. Johnson also raised her voiced or yelled, Tr. 91-95.

Respondent puts Mosiah Grayton on unpaid administrative leave, suspends her and then has her sign a last chance agreement

After receiving Johnson's email of her notes on the afternoon of December 6, Human Resources Generalist Sonsaraye Byers placed Grayton on unpaid administrative leave on December 7. She then investigated Paige Johnson's complaint about Grayton. She interviewed Johnson and Grayton and obtained a statement from Hampleton, who denied remembering very much about the incident.

AFSCME District Council 20 was certified in March 2017 to represent Respondent's EMTs. In December 2017 Respondent and the Union were engaged in collective bargaining negotiations for a first contract.[10] During negotiations Sonny Garibay, staff representative for the Union, asked Byers to step outside the negotiating room to give him an update on what level of discipline Respondent was considering for Grayton.

Byers suggested at hearing that the initiative for a last chance agreement came from Garibay. However, it is absolutely clear that Respondent, by Byers, gave Grayton and the Union a choice between agreeing to a last chance agreement or termination, Tr. 98-100, 138-39, 164-166, 289-90, G.C. Exh. 16. Grayton and Garibay agreed to a last chance agreement because they understood that Grayton would not be allowed to return to work without signing such an agreement. Grayton and Garibay signed a last chance agreement on December 15, 2017, G.C. Exh. 9. The agreement provided that:

> Should Ms. Grayton have another issue related to her behavior during this Last Chance Period [6 months], Ms. Grayton's employment shall be terminated without recourse to any grievance and arbitration procedures set forth in any then applicable collective bargaining agreement…

[10] Respondent and the Union did not reach agreement on a collective bargaining agreement until August 2018.

> The Union and Ms. Grayton agree that upon execution of this Agreement by all Parties, all matters set forth herein shall be considered and deemed to be fully and finally resolved, and that neither the suspension nor Last Chance Period, nor this Agreement shall be subject to the Company's grievance process as defined in the employee handbook.

As a result of this agreement, Respondent changed Grayton's unpaid administrative leave into an unpaid suspension, G.C. Exh. 9. In December 2017, the Union and Respondent did not have an interim agreement regarding discipline. Respondent had its own internal grievance procedure. The last chance agreement, however, as stated above, provided that it would not be subject to that process.

Between December 2017 and May 2018, there were several unsubstantiated allegations of misconduct by Grayton for which she was not disciplined.[11] However, on May 7, a social worker complained to Respondent about his or her interaction with Grayton and Hampleton relative to their transport of a psychiatric patient to the United Medical Center in Southeast Washington, D.C. Respondent also learned that Grayton and Hampleton had ordered food for themselves and the patient while at the hospital, G.C. Exh.10.

As a result of this incident, Respondent terminated Grayton for violating the terms of her last chance agreement. Grayton unsuccessfully invoked Respondent's grievance procedure at steps 1 and 2. AMR issued Hampleton a final written warning.

Evidence pertaining to the issue of whether Respondent met its burden that it would have discharged Grayton in the absence of her protected activity

> Respondent's Employee Handbook contains Standards of Conduct listing offenses which may or may not lead to discipline and may or may not result in immediate termination. Among the listed offenses that are potentially relevant to this case are the following:
>
> Use of language or action that is inappropriate in the workplace whether racial, sexual or of a similar offensive nature.
>
> • Rude or discourteous behavior toward any other person, including but not limited to a client, coworker, or patient. This does not restrict the right under Section 7 of the National Labor Relations Act to engage in protected activities with other employees concerning wages, hours and working conditions.
> …
> • Fighting, threatening, assaulting or abusing another individual.

[11] An employee named Joshua Moody made several harassment complaints against Grayton. Grayton testified she was placed on unpaid administrative leave as the result of one or two of these complaints. The record indicates that she was not disciplined and paid for one such leave period. While the record is unclear, I infer that she was ultimately paid for the second leave (assuming there was a second) as there is no indication in the record that Respondent ever disciplined Grayton as the result of Moody's complaints, Tr. 139-140, 260-62.

…
The Company reserves the right to engage in corrective action up to and including termination, in its sole and absolute discretion, without prior notice to the employee. In all instances the Company, in its sole and absolute discretion, may take into consideration the employee's overall record of employment when determining appropriate corrective action.

Respondent introduced evidence regarding employees who had been disciplined for inappropriate conduct. However, it provided virtually no detail or context with regard to the circumstances of the discipline. With exceptions these employees were identified by last name only as follows.

Ms. Banks: received a Last Chance Agreement on account of inappropriate behavior directed at employee Dakota Ares.

Banks was later terminated for obtaining food while on duty, stealing time and making inappropriate comments on the radio, which was recorded by the FCC.

Mr. Dent was terminated for inappropriate conduct, i.e., threatening a patient.

Mr. Bryan was terminated for inappropriate conduct towards a co-worker.

Mr. Bruno was terminated for inappropriate conduct towards a coworker.

Ms. Dudley received a written warning for responding in a hostile manner on the FCC recorded radio.

Randall Root received a written warning for inappropriate language to a customer.

Jake Wood was given a final written warning and then terminated for unspecified inappropriate conduct.

ANALYSIS

Given the fact that I previously found that the General Counsel met her initial burden of proving discriminatory discharge, I will address Respondent's *Wright Line/General Motors* defense first. Then I reiterate my conclusion that Mosiah Grayton engaged in protected activity in December 2017 and therefore, I conclude that Respondent violated the Act in terminating her in May 2018.

Respondent has not met its affirmative defense under General Motors/Wright Line

To prove a violation of Section 8(a)(3) and (1) under *Wright Line*, "the General Counsel bears the burden of proving by a preponderance of the evidence that animus against protected conduct was a motivating factor in the adverse employment action. If the General Counsel makes a showing of discriminatory motivation by proving protected activity, the employer's knowledge

of that activity, and animus against protected activity, then the burden of persuasion shifts to the employer to prove that it would have taken the same action even in the absence of the protected activity."

The evidence of record does not come close to meeting the Respondent's burden of proving that it had disciplined any employee for conduct materially indistinguishable from that of Grayton on December 7, 2017. The examples provided could have involved sexual harassment, racial slurs, cursing and/or threats—none of which Grayton engaged in. Not only is there no context or details about these disciplinary actions, Respondent has not established that it has any consistent practice in disciplining employees for violations of its standards of conduct.

To start with, there is no policy or practice as to when supervisors are to report incidents to Human Resources. There are also no consistent standards as to when reports of misconduct will result in discipline or the type of discipline. Respondent's inconsistent application of its rules to Grayton's previous misconduct is one example of this.

Mosiah Grayton engaged in protected concerted activity on December 6, 2017.

Section 7 provides that, "employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, *and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection* ... (Emphasis added)."

In *Myers Industries (Myers 1)*, 268 NLRB 493 (1984), and in *Myers Industries (Myers 11)* 281 NLRB 882 (1986), the Board held that "concerted activities" protected by Section 7 are those "engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself." However, the activities of a single employee in enlisting the support of fellow employees in mutual aid and protection is as much concerted activity as is ordinary group activity.

Additionally, the Board held in *Amelio's*, 301 NLRB 182 (1991) that in order to present a prima facie case that an employer has discharged an employee in violation of Section 8(a)(1), the General Counsel must establish that the employer knew of the concerted nature of the activity.[12]

Grayton's conduct was protected and concerted in that she was making common cause with Hampleton in protesting Hampleton's suspension. Her outburst is inseparable from Paige Johnson's apparent unwillingness to rescind the suspension or rectify what they both considered inequitable and inconsistent application of Respondent's fueling policies..

Assisting other employees affected by the employer's action, i.e., Hampleton's suspension, falls within the Act's "mutual aid and protection" clause of Section 7, even if the assisting employee is not personally affected, *Butler Medical Transport, LLC,* 365 NLRB No. 112 (2017); *Richboro Community Mental Health Council,* 242 NLRB 1267, 1267-68 (1979); *Delta Health Center,* 310 NLRB 26, 43 (1993). Moreover, Grayton's outburst concerned

[12] Also see, *Lou's Transport, Inc.,* 361 NLRB 1446, 1447 (2014); *Correctional Medical Services,* 356 NLRB 277 (2010).

Respondent's application of its fuel gage policy, which was an obvious mutual concern to Grayton and Hampleton, who had both been disciplined for violating that policy.[13]

In addition, Grayton's complaint about supervisor Pawlak was concerted and not simply a matter of personal concern. Respondent knew that Grayton's complaints about Pawlak were a group concern because it had received at least one other complaint about him, prior to September 2017, G.C. Exh. 4.

I reiterate my conclusion that Mosiah Grayton's conduct on December 6, 2017 did not forfeit the protections of the Act under Atlantic Steel.

At page 29, footnote 39 of its supplemental brief, the General Counsel states that it intends for the Board to revisit its *General Motors* decision. In light of that intention, I hereby reiterate my conclusion that Respondent violated the Act under the *Atlantic Steel* precedent.

An employer's imposition of discipline violates the Act if it relies on prior discipline that violated the Act and fails to show it would have issued the same discipline even without reliance on the prior unlawful discipline, *Southern Bakeries, LLC,* 366 NLRB No. 78 (2018); *Dynamics Corp.,* 296 NLRB 1252, 252-1255 (1989) enfd. 928 F. 2d 609 (2d Cir. 1991); *The Celotex Corporation,* 259 NLRB 1186, 1186 fn. 2, 1190-1193 (1982).[14] The Board has long held that employers should not be "permitted to take advantage of their unlawful actions, even if employees may have engaged in conduct that -in other circumstances-might justify discipline," *Postal Service,* 367 NLRB No. 142 (June 4, 2019).

[13] Respondent ascribes a great deal of significance to the fact that Grayton was standing in the doorway of Johnson's office rather being inside the room when Hampleton started her conversation with Johnson. This is completely irrelevant. Johnson's statement establishes that she was aware that Grayton was complaining about the application of Respondent's fuel policy to herself and Hampleton.

Respondent also ascribes a great deal of significance to Hampleton's statement to Johnson that she did not have anything to do with what just happened and her apparent initial refusal to give Respondent a statement [Nope, that has nothing to do with me., G.C. Exh. 6]. It is crystal clear that Hampleton was referring to Grayton's tone in her outburst as opposed to the subject matter of Grayton's outburst. At that time and even at the instant hearing, Hampleton was very worried about receiving additional discipline as the result of Grayton's conduct. Johnson's statement establishes that Hampleton already believed that she was being disciplined for alleged misconduct on the part of Grayton, i.e., refusing to refuel the ambulance on November 8.

Also irrelevant to the resolution of this case are statements by Grayton and union representative Garibay that some form of discipline was appropriate for Grayton's December 6 outburst. Either her conduct in Johnson's office was protected or it wasn't. If it was protected, no form of discipline would have been legal.

Respondent also suggests that Grayton outburst was made in bad faith because Respondent had investigated her complaints about supervisor Pawlak. There is no evidence that Respondent made Grayton aware of any investigation or follow-up on her complaints.

[14] In *Celotex,* as in the instant case, there had not been a prior determination that the initial discipline was unlawful until the Board adjudicated the subsequent discipline (a suspension) and the discipline upon which in was predicated (a warning).

In the instant case, Respondent concedes that it would not have terminated Mosiah Grayton had she not violated the December 2017 last chance agreement. Thus, the question is whether the last chance agreement was unlawful.

One issue in this case is whether Grayton's conduct in her December 6 meeting with Paige Johnson was of such a nature that she forfeited the protection of the Act. The criteria for evaluating whether an employee's conduct while engaging in protected activity forfeits the protection of the Act depends in part on when and where the allegedly protected conduct occurred. In the case of direct communications between an employee and manager or supervisor, the criteria is set forth in *Atlantic Steel Co.,* 245 NLRB 814 (1979). In making this determination the Board balances four factors: 1) the place of discussion; 2) the subject matter of the discussion; 3) the nature of the employee's outburst and 4) whether the outburst was provoked by an employer's unfair labor practice; Also see *Overnite Transportation Co.,* 343 NLRB 1431, 1437 (2004).

Grayton's outburst occurred at Respondent's facility in Paige Johnson's office. It did not disrupt Respondent's operations. The subject under discussion was Respondent's suspension of Hampleton and Grayton's perception that Respondent was not responding to her complaints, including complaints about favoritism and inconsistent application of its rules regarding the gas tanks. Grayton did not curse and did not threaten Johnson. Moreover, although her outburst was not provoked by an unfair labor practice, it was provoked by what she perceived to be Respondent's inaction regarding her prior concerted complaints.[15]

In *St. Margaret Mercy Health Care Centers,* 350 NLRB 203, 204-05 (2007), the Board citing *Dreis & Krump Mfg. v. NLRB,* 544 F. 2d 320 (7th Cir. 1976) stated the test as follows:

> Otherwise, protected activity remain[s] protected unless found to be 'so violent or of such serious character as to render the employee unfit for further service.' [16]

Raising one's voice and an insolent manner, are insufficient to forfeit the protections of the Act, *Firch Baking Co.,* 232 NLRB 772 (1977); *Postal Service,* 251 NLRB 252, 259 (1980) enfd. 652 F. 2d 409 (5th Cir. 1981). Other factors that weigh in favor of protection are that this was a single incident, not a sustained course of action, that Grayton did not threaten Johnson and that Johnson herself yelled or raised her voice, *Cadillac of Naperville, Inc.,* 368 NLRB No. 3 (June 12, 2019). In sum, I find that the totality of Board precedent leads me to conclude that Grayton did not forfeit the protection of the Act. Thus, Respondent violated the Act in suspending her and giving her a last chance agreement in December 2017. Due to reliance on the December 2017 last chance agreement in May 2018, Respondent violated the Act in terminating her employment.

[15] Erik Rohde's testimony that Paige Johnson told him that she was afraid of a physical altercation is not credible. Johnson, in her December 8 interview with Byers, stated that Grayton was not being combative; merely that she was yelling. Johnson stated that she did not feel threatened, G.C. Exh. 18.

[16] This standard appears to be what is to be determined after applying all the *Atlantic Steel* factors, *Entergy Nuclear Operations, Inc.,* 367 NLRB No. 135 (2019).

The issue of whether Grayton's December 2017 suspension and last chance agreement are barred by Section 10(b) of the Act is not properly before me.[17]

Section 10(b) of the Act prohibits the General Counsel from issuing a complaint based on an unfair labor practice occurring more than six months prior to the filing of the charge with the Board. However, an employer must raise this statute of limitations defense either in its answer or at trial, *Newspapers and Mail Delivers (New York Post),* 337 NLRB 608, 609 (2002). If raised for the first time in its post-trial brief, the Section 10(b) argument cannot be considered, *Paul Mueller Co.,* 337 NLRB 764 (2002). Although at trial Respondent alluded to the fact that Grayton did not specifically mention the last chance agreement in her initial charge and first amended charge, it never argued that consideration of the last chance agreement was time-barred. Thus, this argument is not properly before me.

However, assuming that I could consider a Section 10(b) argument, I would reject it. On May 24, 2018, Mosiah Grayton filed an unfair labor practice alleging that Respondent violated Section 8(a)(3) and (1) in discharging her. The Board served this charge on Respondent on June 1, 2018. On June 4, 2018, she filed an amended charge alleging that Respondent disparately disciplined and subjected her to increased scrutiny to discourage employees from engaging in union or other protected activity. She also alleged Respondent violated the Act in terminating her for her union activities. The first amended charge was served on June 5.

Both the initial charge and the first amended charge were filed and served upon Respondent within 6 months of Respondent issuing Grayton a last chance agreement. However, it was not until January 9, 2019 that Grayton specifically alleged in her second amended charge that Respondent violated the Act in issuing her the last chance agreement on December 15, 2017.

The United States Supreme Court in *Fant Milling Co.,* 360 U.S. 301, 307-08 (1959) held that a charge merely sets in motion the NLRB's inquiry; it need not be as specific as a judicial pleading. The General Counsel's complaint can therefore deal with any unfair labor practice related to those alleged in the charge and which grow out of the allegations in the charge while the proceeding is pending before the Board.

In *Redd-I, Inc.,* 290 NLRB 1115 (1988) and *Nickles Bakery of Indiana,* 296 NLRB 927 (1989) the Board held that a complaint allegation satisfies the *Fant Milling* criteria if it involves the same legal theory as that contained in a pending timely charge, arises from the same factual circumstances or sequence of events as a timely charge and if a respondent would raise similar defenses to those in the charge.

I find that the complaint in alleging that the last chance agreement violated the Act is sufficiently related to the timely filed initial and the first amended charge to pass muster under Section 10(b). The last chance agreement was part of the sequence of events leading to Grayton's discharge, which she specifically mentioned in the timely filed charges.

[17] The General Counsel's brief addresses the issue as to whether the General Counsel is somehow barred from litigating the last chance agreement by virtue of the fact that Grayton agreed to it. However, Respondent did not plead this as a defense or assert this as a defense in its brief. This issue is also not properly before me.

REMEDY

The Respondent, having illegally suspended and later discharged Mosiah Grayton, must offer her reinstatement and make her whole for any loss of earnings and other benefits. Backpay shall be computed in accordance with *F. W. Woolworth Co*., 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center,* 356 NLRB No. 8 (2010). Respondent shall compensate her for her search-for-work and interim employment expenses regardless of whether those expenses exceed her interim earnings, computed as described above.

Respondent shall file a report with the Regional Director for Region 5 allocating backpay to the appropriate calendar quarters. Respondent shall also compensate Mosiah Grayton for the adverse tax consequences, if any, of receiving one or more lump-sum backpay awards covering periods longer than 1 year, *AdvoServ of New Jersey,* 363 NLRB No. 143 (2016). Also, within 21 days of the date the amount of backpay is fixed either by agreement or Board order, or such additional time as the Regional Director may allow for good cause shown, file with the Regional Director for Region 5 a copy of Mosiah Grayton's corresponding W-2 form reflecting the backpay award.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[18]

ORDER

The Respondent, American Medical Response, its officers, agents, successors, and assigns, shall

1. Cease and desist from:

   (a) Discharging, suspending or otherwise discriminating against any employee for engaging in protected concerted activity.

   (b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

   (a) Within 14 days from the date of the Board's Order, offer Mosiah Grayton full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

[18] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(b) Make Mosiah Grayton whole for any loss of earnings and other benefits suffered as a result of the discrimination against her (including her unpaid suspension in December 2017 and her termination), in the manner set forth in the remedy section of the decision.

(c) Compensate Mosiah Grayton for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file with the Regional Director for Region 5, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar years.

(d) Compensate Mosiah Grayton for her search-for-work and interim employment expenses regardless of whether those expenses exceed their interim earnings.

(e) File with the Regional Director for Region 5 a copy of Mosiah Grayton's corresponding W-2 form(s) reflecting the backpay award as set forth in the remedy section of this decision.

(f) Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful last chance agreement and discharge and within 3 days thereafter notify Mosiah Grayton in writing that this has been done and that the suspension, last chance agreement and discharge will not be used against her in any way.

(g) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(h) Within 14 days after service by the Region, post at its Washington, D.C. V street N.E. facility copies of the attached notice marked "Appendix".[19] Copies of the notice, on forms provided by the Regional Director for Region 5, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at

[19] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since December 15, 2017.

(i) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. September 8, 2021

Arthur J. Amchan
Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT discharge, suspend or otherwise discriminate against any of you for engaging in protected concerted activity.

WE WILL NOT give you a last chance agreement in retaliation for your protected concerted activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of this Order, offer Mosiah Grayton full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

WE WILL make Mosiah Grayton whole for any loss of earnings and other benefits resulting from her discharge, December 2017 suspension and last chance agreement, less any net interim earnings, plus interest compounded daily.

WE WILL compensate Mosiah Grayton for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and WE WILL file a report with the Regional Director for Region 5 allocating the backpay award to the appropriate calendar quarters.

WE WILL compensate Mosiah Grayton for her search-for-work and interim employment expenses regardless of whether those expenses exceed her interim earnings.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to the unlawful suspension, last chance agreement and discharge of Mosiah Grayton and WE **WILL**, within 3 days thereafter, notify her in writing that this has been done and that the suspension, last chance agreement and discharge will not be used against her in any way.

AMERICAN MEDICAL RESPONSE MID-ATLANTIC, INC.

_____
(Employer)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation, and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

Bank of America Center, Tower II, 100 S. Charles Street, Ste 600, Baltimore, MD 21201-2700
(410) 962-2822, Hours: 8:15 a.m. to 4:45 p.m.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/05-CA-221233 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (410) 962-2880.